IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 89 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOHANBHAI DAYALBHAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR VASANT S SHAH for Appellant,
MS.PANDIT, ADDL.PUBLIC PROSECUTOR for Opponent,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 07/03/2007

ORAL JUDGMENT

Present appeal is arising out of the judgment and order of conviction and sentence passed by the learned Special Judge, Ahmedabad (Rural) in Summary

Case No.4 of 1990, on 31st January, 1992, whereby the present appellant-accused was found guilty for the offence punishable under Sections 3 and 7 of the Essential Commodities Act and was sentenced to undergo simple imprisonment for three months and was ordered to pay a fine of Rs.1000/-, in default thereof, to undergo simple imprisonment for one month.

2. To appreciate the rival side submissions, it would be necessary to state the prosecution case in nutshell. It is the case of prosecution that The complainant was the Deputy Mamlatdar and was in-charge of Civil Supplies Section Department of the Office of the Mamlatdar, Dhandhuka on 8/7/1989. The complainant had visited the village Rojid, Tal.Dhandhuka on 27/8/1989 in response to the complaint received from the resident of the said village. It is alleged that they are not getting regular supply of kerosene. One of the main complainant, Pravinchandra Vrajlal Soni who is cited as a witness in the complaint was called and he informed the Mamlatdar that Kanji Bhagvanji, who is authorized to distribute and sell the kerosene, is

not regularly supplying kerosene to the people on demand and is illegally selling the kerosene directly to the persons. The appellant-accused, Mohanbhai Dayalbhai Dungarani, was resident of said village and was running a factory of diamond policing in the house owned by Manubhai Nathabhai Mistry. It is the case of the prosecution that from the falia of said premises, a barrel containing 200 liters of kerosene was found from the possession of the appellant-accused and thereby the accused-appellant was found guilty for offence punishable under Sections 3 and 7 of the Essential Commodities Act, so also, for violating the provision of Kerosene (Restriction on Use) Order, 1966. It is the say of the prosecution that the accused was not holding any such legal pass or permit for possessing the kerosene beyond 18.5 liters. The Control Order was issued as per the scheme of Section 3 of the Essential Commodities Act.

3. After considering the evidence led by the prosecution, the learned Judge came to a conclusion that the prosecution has established the charges levelled against the appellant-accused and therefore, convicted the accused-appellant for the said offence

by the impugned judgment dated 31st January, 1992 passed in in Summary Case No.4 of 1990. It is this judgment and order that has given rise to this appeal.

4. Heard learned Advocate, Mr.Vasant Shah for the appellant and learned A.P.P., Ms.Pandit for the respondent-State.

5. Record and proceedings are before me and I have been taken through the same by both the sides during the course of hearing, mainly the evidence recorded during trial.

6. The Court has evaluated the evidence, so also, the confession made by the accused. A barrel containing 200 liters of kerosene was found by the complainant and Mamlatdar in presence of Panchas. Panchnama was drawn which was at Exh.22. The direction issued by the State Government quantify the maximum stock of kerosene that one was permitted to use is also produced at Exh.27. It is also alleged that Pravinbhai was serving in the factory of appellant-accused and as he was relieved from the service, he made this complaint to the Revenue

Authorities. On conclusion of the evaluation of the evidence, the Court is of the view that the excuse placed by the accused as defence is neither convincing nor otherwise acceptable in view of the evidence produced before the Court. On the contrary, it creates impression that the accused with a view to save his skin has tried to co-relate his personal vendetta between him and one of the witness, Pravin. It is not the case where only one person had made complaint, more than one person had made complaint. For the sake of argument, it is accepted that Pravinkumar having inimical felling was also one of the party making complaint to Mamlatdar about unauthorized and illegal sale and use of kerosene, but backbone of the story placed by the prosecution would not affect.

7. The finding of conviction recorded by the learned trial Judge is absolutely legal and it does not require any interference.

8. After some deliberation and in the background of the evidence of the prosecution as well as the confession / admission made by the Manager, learned Advocate, Mr.Shah, requested the Court to

consider his alternative argument.

9. It is submitted by Mr.Shah, that alleged incident is of July, 1989. The complaint came to be filed in the month of April, 1990. There is no allegation of black marketing against the accused. The accused was on bail pending trial and he has enjoyed the bail after admission of the present appeal in the year 1992. The appeal is old by 14 years and practically 18 years have been passed from the date of occurrence of offence. The offence found proved against the accused is not a ghastly crime. The appellant-accused had left the business and settled in Surat City. In the recent natural disaster of flood, the accused and his family has suffered a lot. He has further submitted that accused has paid the amount of fine which was imposed by the trial Court and therefore the substantive punishment should not be made operative and he should be given the benefit of provisions of Section 360 read with Section 361 of the Code of Criminal Procedure.

10. Mr.Shah, in support of his argument has also placed reliance to one judgment in case of **Harivallabha and Another Vs. State of Madhya Pradesh, reported in**

(2005) 10 S.C.C. 330. He has submitted that in this cited decision the accused was given benefit of Section 360 read with Section 361 of Criminal Procedure Code instead of serving substantive sentence. It would be proper to reproduce the relevant paragraphs of this judgment.

> ***"3. Learned Counsel appearing on behalf of the appellants submitted that the appellants are first offenders and in the facts and circumstances of the case they should have been dealt with under the provisions of Section 360 of the Code of Criminal Procedure, 1973 (for short "the Code") and the High Court reduced the sentence of imprisonment from three years to three months without recording any reasons, as required under Section 361 of the Code, which lays down that for special reasons to be recorded, a court can refuse to release a person on probation of good conduct under Section 360 of the Code. In our view, in the facts and circumstances of the present case, the appellants should have been dealt with under the provisions of Section 360 of the Code.***
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> ***4. Accordingly, the appeal is allowed in part and while upholding the conviction and sentence of fine awarded to the appellants, sentence of imprisonment awarded against them is set aside and the trial Court is directed to deal with them under the provisions of Section 360 of the Code. The appellants, who are on bail, are discharged from the liability of bail bonds."***

10.1 The crucial question before the Court would

be whether the amount of fine can be enhanced. Because, ultimately the people at large are the sufferers and the State Regulating Authority suffers the real loss and found inconvenience and therefore the Respondent-State should require to be compensated and can be compensated from the amount of fine which would be enhanced.

11. Learned A.P.P., Ms.Pandit has drawn attention of this Court to the decision of this Hon'ble Court in case of **(The) State of Gujarat Vs. Ganpatbhai Premjibhai Joshi, reported in 1998 (2) G.L.H. 787** where similar question had cropped up before this Court and while answering to this question and dealing with the grievance raised by the State the Hon'ble Court has observed thus:

> ***"4. In the decision reported in AIR 1975 SC 845, almost similar situation was dealt with by Their Lordship and it was a case under the Prevention of Food Adulteration Act and the benefit was decided to be given.***
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> ***5. Here also, it may be seen that 1958 Enactment whereby the formal expression of the legislative will to grant benefit of probation was clarified and expressed and in no uncertain terms, for the Enactments which were already on***

the Statute Book, necessary, reference has been made in Section 18 to exclude them. Essential Commodities Act, 1958 is not one of the Statues referred Commodities Act was very much in force at the time when said Probation of Offenders Act, 1958 came to be enacted, the Parliament, in its wisdom, has chosen not to exclude it.

6. Under the circumstances, even the provision for minimum punishment will not come in the way because benefit of probation has to be given to the offenders under the provisions of Indian Penal Code as well as under the provisions of all other Statutes providing for penal offences unless they are specifically excluded either in the Statute itself or under the provisions of the said Probation of Offenders Act. This being not the position in relation to the offences under Essential Commodities Act, obviously, the decision taken by the Ld. Spl. Judge cannot be said to be, in any manner, wrong."

12. Ms.Pandit, has also submitted that this Court (Coram: C.K.BUCH, J.) while dealing with one Criminal Appeal No.556 of 1995 of one MUSTUFA SULEMAN KUSKIWALA Vs. STATE OF GUJARAT, decided on 2/3/2007, has given such benefit to the appellant-accused wherein this Court has observed thus:

"23. Before parting with the order, the

Court would like to observe that the Court has considered not only the fact that accused is a riot victim and the time gap between the order of conviction and hearing of the appeal, but has also considered the age of the accused and the fact that there was scope to even reduce the substantive sentence imposed by the trial Court in view of the two Apex Court decisions referred to herein above.

24. Ms.Pandit, learned A.P.P. has fairly pointed out that it is erroneously mentioned by the learned Judge while recording plea that the accused was dealing with a fair price shop. He was a licence holder and has not been convicted as fair price shop dealer. So the accused was not a part of public distribution system otherwise, the Court would not have exercised the discretion in favour of the accused. The Court is inclined to observe that, when it comes to awarding of substantive sentence where the offence is not of that grave nature and the Court finds that accused is a victim of either social or ecological imbalance or disturbance or any disaster beyond control of the accused keeping in mind the basic principle of victimology that has occurred after

commission of offence, the Court must assign reasons as to why benefit either under Section 360 read with Section 361 or under Section 4 or 6 as the case may be, has not been given to the appellant-accused. The protraction of trial or hearing of the appeal is not relevant while evaluating the validity and legality of the judgment or considering the quantum of period of punishment, but the conduct of the accused in the period in between can be considered while dealing with the plea of Probation of Offenders Act. If he turns so positive and helpful to the society in an illustrative way, then, application of reformatory school of thoughts would be appropriate by granting benefit under Section 360 read with Section 361 of the Code of Criminal Procedure or under Section 4 and 6 of the Probation of Offenders Act."

13. In the background of the above cited decisions, the alternative submission made by learned Counsel, Mr.Shah is accepted.

14. In the result, present Criminal Appeal No.89 of 1992 is partly allowed. While confirming the judgment and order of conviction passed by the

learned Special Judge, Ahmedabad (Rural) in Summary Case No.4 of 1990, on 31st January, 1992, and by enhancing the amount of fine imposed by the learned trial Court, the order of substantive sentence is hereby altered.

14.1 The amount of fine imposed by the trial Court is enhanced to Rs.10,000/- (Rupees Ten Thousand Only). The appellant-accused has paid the amount of fine Rs.1,000/- imposed by the trial Court and therefore he shall now pay the remaining amount of fine i.e. Rs.9,000/- (Rupees Nine Thousand Only) with the trial Court within 30 (thirty) days from the date of receipt of copy of the writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court.

14.2 The appellant-accused is directed to execute the bond of Rs.5,000/- (Rupees Five Thousand Only) of good conduct with one surety of the like amount for a period of one year under the scheme of Section 360 read with Section 361 of Criminal

Procedure Code, 1973 while paying the amount of fine. The appellant-accused shall execute the bond of good conduct before the concerned trial Court within a period of 30 (thirty) days from the date of receipt of the copy of this writ, failing which the trial Court shall issue non-bailable warrant for arrest of the appellant-accused and he will be liable to serve the sentence imposed upon him by the trial Court. The order of substantive sentence shall remain under suspension till the period of bond of good conduct i.e. for one year and shall become inoperative on completion of the period of one year.

14.3 The appellant-accused is also directed that in case of violation of any of the conditions of the bond of good conduct, the trial Court shall at liberty to issue warrant for serving the sentence imposed by the concerned trial Court.

14.4 The Bail Bond executed by the appellant-accused shall stand discharged on the date on which the appellant-accused executes the bond of good conduct before the trial Court. Order and Direction accordingly.

(C.K.BUCH, J.)

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